REVISED (NOV. 4, 1988) FINAL
STATEMENT OF REASONS
22 CALIFORNIA CODE OF REGULATIONS DIVISION 2

Section 12201. Definitions
Subsection (a) - In the Course of Doing Business

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.)(hereinafter the "Act") was adopted as an initiative statute at a general election on November 4, 1986. The Act prohibits any "person in the course of doing business" from (1) knowingly discharging or releasing certain chemicals into water or onto or into land where such chemicals pass or probably will pass into any source of drinking water, and (2) knowingly and intentionally exposing any individual to such chemicals without first giving a clear and reasonable warning.

The term "person in the course of doing business" is defined by the Act to exclude businesses of less than a specified size, governmental entities, and entities in their operation of a public water system. However, the definition does not specify what acts or omissions are "in the course of doing business."

Health and Safety Code section 25249.12 authorizes agencies designated to implement the Act to adopt regulations as necessary to conform with and implement the provisions of the Act and to further its purpose. The Health and Welfare Agency ("Agency") has been designated the lead agency for the implementation of the Act.

On July 3, 1987, the Agency issued a notice of proposed rulemaking advising that the Agency intended to adopt a regulation defining several terms in the Act, including "in the course of doing business." Under the proposed definition of "in the course of doing business," the term would include any business activity without regard to whether it is conducted for profit.

Pursuant to such notice, a public hearing was held on August 19, 1987, to receive public comments on the proposed regulation. Several comments were received requesting clarification about which acts or omissions by a business or its employees are in the course of doing business. Specifically, the comments recommended the exclusion of certain acts of employees, and acts caused by war or natural disaster. The Agency declined to make such modifications to the regulation on the ground that the modifications proposed were outside the scope of the original proposal. As explained in the final statement of reasons to that regulation:

> "Government Code § 11346.8 prohibits the adoption of a regulation which has been changed from that originally made available to the public unless the change is 'sufficiently related to the original text that the

public was adequately placed on notice that the change could result from the originally propose regulatory action.' These recommendations and objections are so expansive when compared to the limited scope of the original text that their adoption at this time would, in the lead agency's view, violate this Government Code provision. The lead agency will consider them as a possible subject for future regulatory action."

The limited definition of "in the course of doing business" was adopted on January 27, 1988, effective February 26, 1988. On February 16, 1988, the Agency issued a notice of emergency rulemaking adopting amendments to section 12201, subsections (a) and (b) effective February 27, 1988. Like the previous version of section 12201, subsection (a), the emergency definition includes as "in the course of doing business" any act or omission of a business, whether or not for profit. The amended definition, however, provided for specified exceptions in response to the August 19 comments.

On May 20, 1988, the Agency issued a notice of emergency rulemaking advising that the Agency intended to adopt the amended version of section 12201, subsection (a) and (b) through formal rulemaking. ("May 20 proposal.") Pursuant to such notice, a public hearing was held on July 29, 1988, and public comments were received through that date. Fifteen parties submitted comments.

The Agency has reviewed the comments submitted. This final statement of reasons sets forth the reasons for the final language adopted by the Agency for section 12201 (a) and (b), and responds to the objections and recommendations submitted pursuant to the May 20 notice regarding those provisions.

As amended, section 12201 (a) includes "in the course of doing business" any act or omission of a business, whether or not for profit. This incorporates into the amended regulation the original provisions of section 12201 (a). The amended regulation also includes two exceptions. The first exception was included in the original provisions of section 12201 (a); acts excluded by the definition of "person in the course of doing business" in the Act are excluded from the regulation.

The second exception is new. Acts or omissions caused by acts of war or grave and irresistible natural disasters are excluded from the meaning of "in the course of doing business." As with true accidents or misfortune (See Title 22 CCR § 12201(c)), it appears that little benefit would be derived from the imposition of civil penalties upon the blameless victims of circumstances such as war or natural disaster. This exception is limited. The discharge, release or exposure must be caused by an act of war or grave natural disaster. The natural event must constitute a disaster of grave or serious proportions, and it must be irresistible, i.e., no reasonable amount of resistance or advance preparation would be sufficient to avoid the discharge, release or exposure.

Six parties commented on this provision. Four commentators recommend deleting the language "grave and irresistible natural disasters" alleging the phrase is ambiguous and subject to unnecessary debate. In the Agency's view, the language clearly communicates the intent that, to be exempt, an occurrence must be of a serious nature which cannot be resisted.

Three commentators suggested substituting "unavoidable natural occurrences." (Exh. 5, p. 1; Exh. 6. pp. 1-2: Exh. 7, pp. 5-7.) This phrase would be overly broad. A simple rainstorm is an unavoidable natural occurrence. The intent of the regulation however, is not to exclude from the Act discharges, releases or exposures caused by all such events. It excludes only those which the voters cannot reasonably have intended to provide a basis for liability, i.e., those disasters of such grave or serious proportions that they are irresistible.

One commentator recommended a statement in the regulation "that the availability of the exception in a given circumstance is dependent upon the nature and extent of the disaster, and the reasonable steps that were or could have been taken to mitigate any potential adverse consequences." (C-35, p. 17.) However, the nature and extent of the disaster, and the steps available to resist it, are simply factors in proving an occurrence was "grave and irresistible." It appears duplicative and unnecessary to expressly state these factors.

One commentator stated that there should be no exception for occurrences of "grave and irresistible natural disasters" because the exception takes away the incentive for safety and prevention. The commentator believed that "a reasonable amount of advance preparation should include careful flood, fire, earthquake, and high wind planning." (C-48, p. 1.) The Agency agrees that businesses should prepare for foreseeable adverse natural events which reasonably can be resisted. However, where natural disasters are grave and irresistible, businesses caught in such situations should not be penalized.

As one commentator put it, "by relying upon whether a 'reasonable amount of resistance or advance preparation' would avoid the discharge, release or exposure, [the Agency] has provided guidance as to which acts or omissions are exempted without imposing arbitrary and insupportable distinctions in connection with exempted acts or omissions." (C-36, p. 2.)

Subsection (b) provides that the phrase "in the course of doing business" includes any act or omission of any employee which furthers the purpose or operation of the business, or which is expressly or implicitly authorized, except as otherwise provided in the section. Seven parties commented on this provision.

Comments received at the August 19, 1987, hearing regarding section 12201, subdivision (a) had suggested that both a furtherance of business purpose and employer authorization be required. However, the May 20 proposal did not adopt this suggestion. Employees may act or omit to act without specific

authorization if they perceive that it will further their employer's purpose, and such acts or omissions may result in a discharge, release or exposure. Further, the employer's authorization would likely be implied due to the benefit it received.

Six commentators again recommended that both furtherance of business purposes and employer authorization be required for an act or omission to be considered "in the course of doing business." (Exh. 1, p. 3; Exh. 5, p. 1; Exh. 8, p. 4; C-23, p. 2; C-35, p. 17; C-45, p. 1.) One commentator argued that the regulation should distinguish between acts legitimately within the scope of employee's responsibilities and any situations in which the employee acts contrary to an employer's specific directions. (C-35, p. 17.)

It long been a fundamental rule that an act need not be authorized to be within the scope of employment. See De Mirjan v. Ideal Heating Corp. (1954) 129 Cal.App.2d 758, [278 P.2d 114]. If this were not the rule, an employer would rarely be responsible for his employee's wrongful conduct since such conduct is rarely authorized. To require both in the regulation might exclude from the Act some conduct within the scope of employment.

Another commentator recommended that the Agency restrict acts or omissions of any employee to those which further the purpose or operation of the business and delete the reference to express and implied authority. (Exh. 1, pp. 3, 4.) It is conceivable, however, that an act of an employee may not further the purpose or operation of the business, but would be authorized by the employer, e.g., an act done on behalf of another business with the employer's consent. Therefore, the Agency believes that it is necessary to retain both conditions.

Another commentator argued that the regulation as written could make an employer liable for an employee's intentional and illegal conduct. (C-45, p. 1.) If the intentional and illegal conduct furthers the purpose or operation of the business or is authorized by the employer, there is no apparent reason to exclude it from the Act. The purpose of the Act to prevent certain discharges, releases and exposures, and the Agency believes that this purpose will be furthered by imposing liability on "persons in the course of doing business" who ultimately control or benefit from such acts.

Two commentators objected that it would be unfair to include activities that are outside the control of the business. (Exh. 5, p. 1; Exh. 8, p. 4.) The agency agrees, but believes that only those acts which do not further the purpose or operation of the business and are not authorized by the employer are outside of the employer's control, except as otherwise provided.

Another argued that whether an employee perceives that certain actions will further the employer's purpose should not be the test of whether a particular act was authorized. Employees

sometimes act believing that their actions will further their employer's purpose when the end result is directly contrary to such purpose. (C-23, p. 2.) However, this comment is inapposite because the regulation does not establish such a test. The test is: does the act or omission further the purpose or operation of the business, or was it authorized by the employer.

Comments received at the August 19, 1987, hearing regarding section 12201, subdivision (a) had recommended that the employer's authorization be express. However, the May 20 proposal did not adopt this suggestion, since such a requirement would be contrary to generally accepted concepts of the law of agency, and might reduce many enforcement actions to disputes over whether the employer gave an order directing the act or omission.

One commentator recommended deleting "implicitly authorized" alleging the phrase lacks clarity and broadens liability subjectively. (C-5, p. 2.) However, the concept of "implied" authority has a long history of judicial application, and the courts have ample precedent to guide their interpretation of the term.

Comments received at the August 19, 1987, hearing regarding section 12201, subdivision (a) had also recommended that the regulation exclude the personal use, consumption and production of listed chemicals by employees from the meaning of "in the course of doing business." The May 20 proposal partially adopted this suggestion, but qualified the exclusion. The regulation excludes the use, consumption or production by employees of a listed chemical on the employer's premises or elsewhere while on duty from the meaning of "in the course of doing business" unless the employer knows of it, and knows that it will expose individuals to a listed chemical.

This qualification is predicated upon the rationale that an employer may not know what listed chemicals employees will use, consume or produce personally, and may not know whether anyone will be exposed to such chemicals. If not, liability should not attach. However, where the employer does know, the exception should not apply.

Five parties commented on this provision. In general, the commentators recognized the need for an exception concerning an employee's personal use, consumption or production of listed chemicals. However, they objected that employers remain responsible for personal acts about which they have knowledge, and which cause a known exposure. As one commentator put it, the "knowing" exceptions to the exclusion results in only "unknown" personal use being excluded from the definition, and "unknown" discharges and exposures are not covered by the Act in the first place. (Exh. 1, pp. 3, 4; Exh. 5, p. 1; Exh. 8, pp. 4-6; C-23, pp. 1, 2; C-45, pp. 1,2.)

The regulation makes a distinction with regard to the knowledge required which the Agency believes is significant. It provides

that the employer must not only know of the personal act, but must also know that an exposure will result. Thus, under the regulation, knowledge of the personal act does not automatically presume knowledge that an exposure will result. Knowledge of both must be proved. That the Act also requires knowledge simply means that the regulation is consistent with the statute. However, this consistency is achieved without being duplicative.

Four others contended that an employee's personal use is not a business activity. (Exh. 5, p. 1; Exh. 8, p. 4; C-19, p. 2; C-23, p. 1.) However, to exclude all personally motivated activities of employees on the ground that they are personal might exclude from the Act many acts which the Agency believes the Act may have been intended to cover. For example, an employer could permit an employee to change the oil in his car on the employer's premises and drain the used motor oil out onto the ground or otherwise dispose of chemicals on the employer's property.

The purpose of this regulation was not to absolve businesses from responsibility for all personally motivated acts of employees, but rather those personal acts about which businesses have no knowledge and cannot control. Smoking, for example, is a personal act, but if the employer knows of smoking in the work-place, and knows that non-smoking employees will be exposed, the employer can control the exposures and ought to provide a warning for the authorized behavior. Thus, the Agency concluded that is is necessary to limit the exemption where such knowledge exists.

Two commentators object because an employer could be cited for an employee's discharge of which he had no knowledge simply if it were shown that he "should have" been aware of his employee's actions. (Exh. 1, 4; C-23, p. 2.) Similarly, one commentator objected to the regulation, alleging that it overreaches the intent of the Act and effectively requires an employer to monitor the personal conduct of its employees. (C-45, p. 1.) This interpretation appears to be unreasonable. The regulation does not mandate that the employer police the personal activity of employees. It provides that the employer has an obligation to protect against discharges or exposures about which the employer has knowledge. It does not require that the employer actively search for such knowledge. If the employer knows or should know of the exposure then it can take appropriate action; otherwise it cannot.

One commentator objected that the language suggests that an "exposure" does not take place if an employee consumes a food that the employee brought to the facility for her own consumption, whereas if the employee shares the food with others this conduct may be subject to the Act. The commentator states that there is not a reasonable basis for this distinction and believes that any consumption of food by employees brought to the facility for personal consumption not be subject to the Act. (C-23, p. 2.)

The example of food shared among employees has been raised in the past and the regulation adequately addresses it. The employer must know or have reason to know that the exposure, the act of sharing the food, will occur and know or have reason to know that an exposure to a listed chemical will result. It is unlikely that any employer will know in advance that one particular employee is going to exchange food with another, or that an exposure to a listed chemical will result. The regulation does not require a lunchbox inventory each day.

Even assuming that employee food sharing is not covered by this exception to the Act, for most chemicals the reasonable anticipated rate of exposure from food sharing would be so low that no liability could arise. (See Title 22 CCR § 12721.) In the Agency's view, this is not the stuff that enforcement actions under the Act are made of. Therefore, the exception has been retained as proposed.

Additional comments of a general nature were addressed to Health and Safety Code section 12201. One commentator suggested that the Agency clarify "that the covered activities are only those conducted within the State (of California)." (C-35, p. 15.) In the Agency's view, the fact that the regulation is an interpretation of a California statute makes this readily apparent.

Two commentators recommended that the Agency revise the definition of "in the course of doing business" to clarify that suppliers of non-consumer products are subject to the Act in their role as suppliers only to a limited extent. (C-34, p. 4; C-35, p. 16.) They argue that the suppliers should be obligated to provide their customers in California with information concerning listed chemicals in their products above the Act's threshold levels, but they should not be obligated to provide warnings directly to individuals who may be exposed. The Agency recognizes this issue as being valid but believes section 12201 is not the proper place to address it. The issue is discussed in the Final Statement of Reasons for section 12601, Clear and Reasonable Warning.

One commentator suggested modifying section 12201 to clarify the 12-month warning requirement exemption as it applies to manufacturers. (C-39, p. 3.) The commentator implied that one year was not enough time given the time uncertainties associated with the distribution of manufactured products. The 12-month warning requirement exemption is specifically provided in the Act. Health and Safety Code section 25249.10(b). Therefore no change to that exemption has been made in these regulations.

Two commentators recommended that the regulatory definition of "person in the course of doing business" be amended to recognize that all plumbing products or all parts of the water distribution system fall within the scope of the "public water system" exemption of the Act. (C-40, p. 2; C-41, p. 6.) The authors of this proposal have misconstrued the language of the regulation. Health and Safety Code, section 25249.11 exempts governmental,

quasi-governmental organizations and certain employers. It does not, nor was it intended to, exempt component parts.

Throughout the adoption process of this regulation, the Agency has considered the alternatives available to determine which would be more effective in carrying out the purpose for which the regulation is proposed, or would be as effective and less burdensome to affected private persons than the proposed regulation. The Agency has determined that no alternative considered would be more effective than, or as effective and less burdensome to affected private persons than, the adopted regulations.

The Agency has determined that the regulation imposes no mandate on local agencies or school districts.